



Empower Yourself to Avoid the Risk of Failing to Know or Apply the Law

By Rachel Edwards

Malpractice can be an intimidating topic for attorneys. It often triggers us to bury our heads in the sand or feel as though we have no control over the likelihood of making a mistake. Fortunately, the ability to collect and analyze claims data allows us to identify trends, draw conclusions, and provide tips for how to manage risk.

The American Bar Association reviewed claims data from a number of legal malpractice insurance carriers throughout the United States and Canada spanning 2016 to 2019. Substantive errors, such as the failure

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Excess Coverage: What Is It and Does My Firm Need It?

By Melanie Hughes

When deciding whether to purchase excess coverage, a good first step is to evaluate the level of risk generated by your firm's legal work. Will the firm's or members' assets be exposed if a large claim is filed? If the answer is "maybe" or "yes," it might be time to consider adding excess coverage.

A discussion about excess coverage would not be complete, however, without reference to primary coverage. Every attorney in private practice whose principal office is in Oregon must carry PLF Primary Coverage, unless they qualify for an exemption. The coverage limit for 2023 is \$300,000, with an additional \$75,000 claims expense allowance. This coverage renews annually on January 1, though an attorney can activate or drop coverage anytime if their situation changes and they become eligible for coverage or an exemption midyear.

In contrast to primary coverage, which is issued to individual attorneys, PLF Excess Coverage is underwritten, optional, and sold only to firms (including sole practitioners). Thus, profiles of the firm and member attorney(s) are subject to specific underwriting criteria, and the premiums will vary to reflect risk disparities among firms. The PLF offers two excess limits for new applicant firms — \$700,000 and \$1.7 million, with up to \$9.7 million for renewing firms or firms with prior excess coverage. (Higher limits are subject to meeting additional underwriting criteria.)

PLF Excess Coverage stacks on top of the PLF Primary Coverage limit as an additional layer of malpractice protection. It serves to reduce exposure to the firm and/or the member attorney if a claim should exceed the primary limit. Excess coverage is available on the commercial market as well as through the PLF. Most Oregon law firms meet the PLF's underwriting criteria, and all firms are welcome to apply. If it appears a firm does not meet the criteria after submitting an application, the firm is notified and given the opportunity to provide additional information in their favor or withdraw their application.

Like the PLF Primary Plan, PLF Excess Coverage is also "claims made." This means that coverage is not triggered unless the plan is in force when the claim is reported **and** the work giving rise to the claim occurred after the retroactive date listed on the coverage. Even if the plan was in effect when the work giving rise to the claim happened, the coverage would not be triggered if the plan was not in force when the claim was actually *reported* to the PLF. For this reason, it is prudent to renew your plan annually to avoid any gaps in coverage.

One notable difference between the two plans is the automatic inclusion of a Cyber Liability & Breach Response Endorsement under the Excess Plan, with a limit of \$100,000 for firms of 1 to 10 attorneys, and \$250,000 for firms with 11 or more attorneys. Additional cyber liability coverage is available for purchase on a separately underwritten basis up to \$1 million. With law firms increasingly the targets of cybercrime, this benefit offers peace of mind as firms adapt to the ever-changing cyber security landscape.

New firms can submit Excess applications throughout the year via the online Excess Portal. Firms with limited or no prior acts coverage may be eligible for a discount on the cost of their first year of PLF Excess Coverage. Renewing firms wanting to bind 2024 Excess coverage with a January 1 effective date must apply between October 23 through December 8, 2023.

If you would like to learn more about or apply for PLF Excess Coverage, please visit our website, email excess@osbplf.org, or call 503.924.4177 to speak with an underwriter for answers to firm-specific questions.

Melanie Hughes is a PLF Professional Liability Underwriter.

PLF ANNOUNCEMENTS: UPCOMING CLE

Understanding Your Firm's Cybersecurity Obligations and Exposures

Wednesday, May 31, 2023 | 10:00 – 11:00 a.m.



Why cybersecurity matters.

With expert insight on data breach management and practical tips to protect your firm and your clients. Register and learn more on our website .

Continue your legal education with the latest CLEs from the PLF.

Re-watch past seminars to receive useful insights and advice pertaining to practice management, office systems, technologies, and much more. Head to our website to see all past CLEs from the PLF.



CLAIMS CORNER

Oh, No! A Claim Has Been Made Against Me: What Happens Now?

By Sarah Troutt

You have probably wondered — perhaps even worried — about what happens if someone makes a professional liability claim against you. This article answers some of the initial questions you likely have and explains part of the claims process.

What should I do if someone is alleging a claim against me?

If you learn that someone has made a claim against you or against another attorney at your firm, either by demanding compensation or by filing a lawsuit, you should immediately notify the PLF. You can begin the process of reporting a claim in several ways: (1) call the PLF receptionist at 503.639.6911 or 800.452.1639; (2) call an individual PLF claims attorney; or (3) call the PLF's Director of Claims, Matt Borrillo. You can also report a claim on our website at <https://osbplf.org/claims/reporting-a-claim>.

What happens after a claim is reported to the PLF?

If a claimant files suit against you or if the PLF receives notice of a malpractice claim against you, we will open a claim file and begin the process of evaluating the claim and seeking to resolve it.

When a claim is reported to the PLF, we assign a claims attorney to work with you throughout the claims process. The claims attorney assigned to the claim will contact you and may ask for a written narrative. Under your PLF Coverage Plan, you have a duty to provide a narrative if requested, as well as a duty to cooperate with our efforts to investigate and evaluate the claim. Usually, we will need a copy of your client file and any other relevant documents. We will also gather information from the claimant or claimant's counsel concerning the specifics of the claim.

If the claim has merit, we might attempt to negotiate a settlement or, at our discretion, retain

substitute counsel to attempt to repair the problem. If appropriate, we will deny the claim, informing the claimant or claimant's counsel in writing. If a claimant files a lawsuit, we will hire defense counsel to defend you. In some cases, we may also hire defense counsel to assist us in evaluating a claim. We will consult with you about these decisions.

What obligations do I have if a claim is made against me?

As a general matter, you have a duty to promptly report the claim to the PLF. You are also required to assist and cooperate in our handling of malpractice claims. It is important to review your obligations under the applicable PLF Primary Plan and any applicable excess coverage you may have, either with the PLF or with a commercial carrier. Failure to comply with the duties and conditions under your applicable coverage plan or policy can affect your coverage. For duties of covered parties under the current PLF Primary Coverage Plan, see Section VIII. Similar duties under the current PLF Excess Plan appear in Section IX of that Plan. You can view and download the PLF Primary and Excess Plans on our website (<https://osbplf.org>).

Sarah Troutt is a PLF Claims Attorney.

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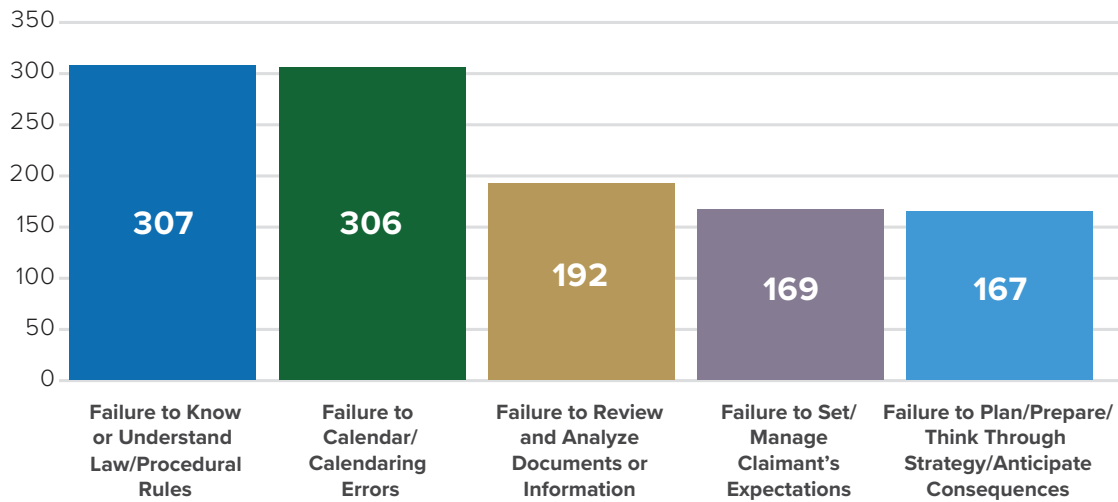
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Factors Causing Malpractice Claims

PLF Claims Closed 2019-2022



to know or properly apply the law and inadequate discovery or investigation, accounted for a little over half of all the claims. Of the top five reported individual error types, failure to know or properly apply the law continues to be the most frequent basis for alleged malpractice, comprising nearly 16% of all claims in the ABA study.

These statistics are consistent with information the PLF gathered from reports on closed claims between 2019 and 2022. In line with the data from the ABA, our numbers revealed that failure to know or properly apply the law is the number one driver of malpractice claims, with failure to calendar and calendaring errors following close behind.

Failure to Know or Properly Apply the Law

It may seem intuitive, yet additional context and examples can provide helpful insight into the root causes. The Lawyers Indemnity Fund, (<https://www.lif.ca/>), a legal malpractice insurance company in British Columbia, parses out the two distinct problems that lead to this type of malpractice:

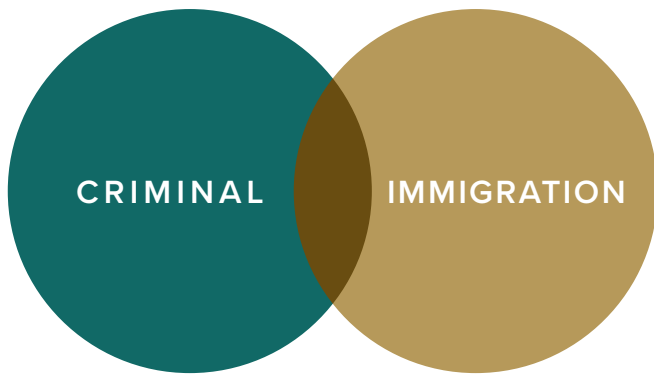
1. Ignorance of the law. You may not know a law exists, or you have some knowledge of the law, but

you don't understand the limits of that knowledge, and you don't dig into the law to determine its impact on the matter. For example, a family law practitioner represents a client in a divorce but is unfamiliar with one of the spouse's retirement benefits. The attorney doesn't investigate further and omits the necessary language in the judgment to ensure a proper distribution.

2. Not thinking it through. You know the law, but you don't fully consider all the legal strategies, issues, or steps required to get your client the result they want. For example, an experienced estate planning practitioner uses a template to draft a complex trust for a business client to allow for distributions of stock to family members, with the goal of minimizing tax liability. The attorney has drafted many trusts for business clients but never this particular type, and they don't do the research to assure that the template language will achieve the client's goals.

Reasons for Failure to Know or Properly Apply the Law

What is causing attorneys to fall into this trap? Although it's difficult to pinpoint all the reasons, insight into claims data shows that these are the main culprits:



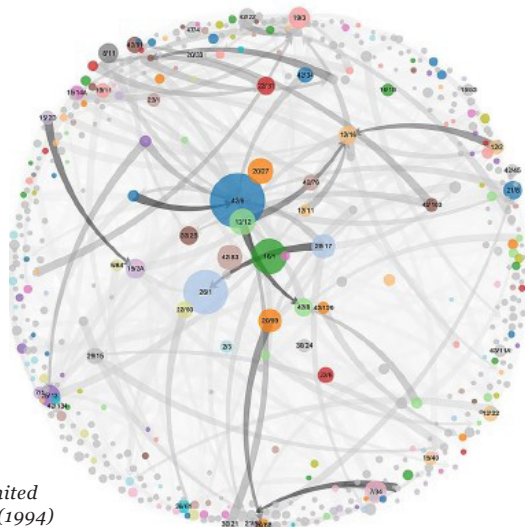
1. Unfamiliar areas of law

It could be general inexperience for a new attorney or a new area of law for an experienced attorney. A common example is the conscious choice to expand into a new practice area but failing to do the necessary research to prepare for taking on those types of cases. Another situation involves an attorney who is competent in a particular practice area but fails to recognize an overlapping area of law unfamiliar to them. For example, estate planning matters often require knowledge of complex tax issues, domestic relations cases frequently involve property distribution and tax issues, and criminal matters often intersect with immigration issues.

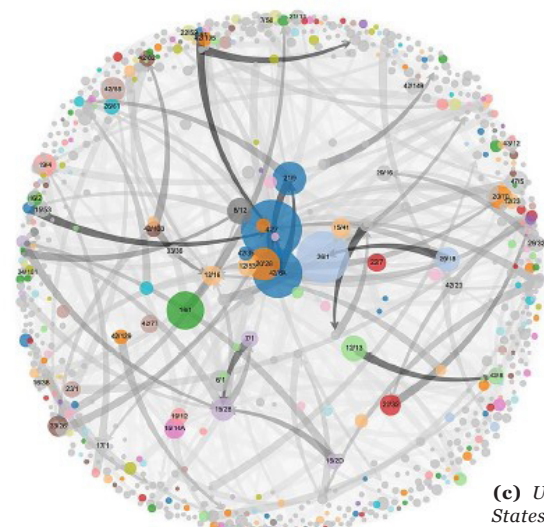
2. Increasing complexity in the law

The law in this country has become more complex over the past few decades. Many factors play into this, such as population growth and increasing interconnectedness, resulting in more societal issues requiring laws to address them. Additional legislation begets more case law to interpret that legislation. Those tasked with understanding and applying the laws often must integrate information from multiple sources to obtain a complete picture.

The more interwoven, the harder it can be to comprehend the law's implications. The diagrams below compare the U.S. Code in 1994 and 2018. The circles reference different chapters in the Code, and the arrows connecting the circles indicate that text contained in one chapter is cited in another. These charts provide a helpful visual representation of the growth in volume and connectivity of federal legislation. Growth in volume is especially notable in areas involving public health, social welfare, and financial regulation.



(a) United States (1994)



(c) United States (2018)

Figure 4, Katz, D.M., Coupette, C., Beckedorf, J. et al. Complex societies and the growth of the law. *Sci Rep* 10, 18737 (2020). Reprinted with permission.

The above circular graphs visually represent the interconnectedness of cross citing in the U.S. Code by comparing the years 1994 (left) and 2018 (right). The original figure also included data from Germany for the same periods. Those have been omitted since this article focuses on the United States.

3. Remote work and difficulty making connections

A strong argument can also be made that it has become more challenging to know and properly apply the law in the changing work landscape. Many attorneys rely on their professional connections for assistance, including asking questions, sending referrals, or seeking co-counsel. If you work remotely, even part-time but especially full-time, it can be difficult to make those connections and reach out for help when needed.

Apply Ethical Standard to Every Case

This type of malpractice invokes the quality of legal representation and the ethical rule regarding competency. As defined by Oregon Rule of Professional Conduct (ORPC) 1.1, the rule of competency states that a lawyer shall provide competent representation to a client, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. We often incorrectly equate competence with intelligence. Intelligence is “the capacity to acquire and apply knowledge.” Competency is not about an attorney’s capacity to acquire and apply knowledge; it is about setting an ethical standard for the representation of clients. We also commonly apply the word “competent” to our ability to practice law in general, instead of applying it to each matter. Rather than asking, “Am I a competent attorney?” ask yourself,

“Do I have the knowledge, skill, thoroughness, and preparation reasonably necessary for this particular client matter?”

If you are unable to give a clear yes or no answer before taking on a new case, you are opening yourself up to a potential malpractice claim. Be sure you have the time and resources necessary to provide competent representation before taking on any new matter.

How to Avoid This Malpractice Trap

You have the ability to lessen your chances of committing this error, because the root cause stems

from attorneys straying into unfamiliar areas of law and not properly applying the competency standard to each matter of representation. Thankfully, you can take some actions (and steer clear of others!) to reduce your odds of falling into this common trap:

1. Don’t dabble in practice areas outside your expertise

Focus on a few practice areas at most so you can acquire the requisite knowledge and develop your expertise. Many attorneys, especially newer attorneys, often wonder how they can learn if they are discouraged from taking cases that might be a stretch for them. If you are new to private practice or have decided to switch or expand to a different area of law, you may need to accept cases where you are not yet familiar with the applicable rules, procedures, and legal concepts. Make sure you have the time and resources to perform comprehensive research and consult with more experienced practitioners if necessary.

Admittedly, it can be difficult to turn away clients when you need the business, and especially hard to decline referrals from other attorneys, family members, friends, or potential clients who have limited resources or are in dire need of assistance. Attorneys often feel tremendous pressure to accept these cases even if they fall outside the scope of their expertise. However understandable, dabbling is not a sustainable way to practice law and spells danger for both you and your clients.

2. Screen for multiple areas of law

It is not uncommon for legal matters to touch on more than one area of law. Identify those areas that may impact your practice and keep up to date on the changes in those laws. If you are comfortable handling one aspect of a client’s case but not another, advise them to find an attorney who specializes in that field. Don’t allow clients to pressure you into taking on matters you should refer to someone else. It is in your clients’ and your own best interests to focus on your areas of expertise and advise them to seek counsel for the others. Specify in writing the scope of your representation in the engagement letter.



3. Network and find mentors

Seek out professional opportunities to meet other lawyers whom you can ask for resources and guidance. Even colleagues who work in the same firm may find it difficult to connect if working remotely. Take advantage of videoconferencing software like Zoom, Microsoft Teams, or Cisco Webex, which also offer chat functionality. If you don't feel comfortable reaching out to others in your firm or are a solo attorney, consider joining a section (<https://www.osbar.org/sections>) through the Oregon State Bar, many of which are practice-area specific and offer valuable educational resources and networking opportunities, including listservs, newsletters, and regular CLEs. Even if you are not a member of that section, you can contact executive committee members and establish relationships. Also consider joining affinity, county,

and specialty bar associations (<https://www.osbar.org/members/localbars.asp>). Even if not practice-area specific, these bar associations present a great networking opportunity and often provide substantive resources.

4. Consider associating with co-counsel

Failure to know or properly apply the law affects solo attorneys disproportionately. Sole practitioners often do not have access to the same level of support and resources available to those who work in multi-attorney firms. If you are unsure how to handle a legal matter, decline the representation or consider finding an attorney who is knowledgeable in that area of law and willing to co-counsel with you. That solution allows you to remain on the case and learn through experience. If co-counseling, clearly define in writing which attorney is performing what task to avoid misunderstandings.

PLF Board Positions

The Board of Directors of the Professional Liability Fund is looking for one lawyer and one public member to serve a five-year term on the PLF Board of Directors beginning January 1, 2024. Directors attend approximately six one- to two-day board meetings per year, plus various committee meetings. Directors are also required to spend considerable time reading board materials between meetings and participating in telephone conference calls to discuss claims. PLF policies prohibit directors and their firms from prosecuting or defending claims against lawyers.

Interested persons should send a brief resume by May 31, 2023, to:

Megan Livermore
MeganL@osbplf.org
Professional Liability Fund
PO Box 231600
Tigard, OR 97281-1600



5. Keep track of your legal research sources and changes in the law

Microsoft OneNote is a digital notebook that can be a great option for keeping track of legal research sources and information. Other digital notetaking options include Evernote and Joplin. The law is continually changing, especially in certain practice areas like landlord-tenant and court procedural rules. Block out time on your calendar for careful and comprehensive legal research. If you aren't sure where to look for information or how to proceed, tap into your network and reach out to other attorneys with more experience. Some common legal research sources for Oregon attorneys include:

- **Oregon Revised Statutes** (https://www.oregonlegislature.gov/bills_laws/pages/ors.aspx)
- **Oregon Judicial Department Rules Center** (<https://www.courts.oregon.gov/rules/Pages/default.aspx>)
- **Oregon Statutory Time Limitations Publication** (https://assets.osbplf.org/2022%20OSTL_Revised.pdf) (searchable in BarBooks)
- **OSB BarBooks and Fastcase** (Log-in at <https://www.osbar.org/index.html>)
- **Westlaw** (<https://legal.thomsonreuters.com/en/westlaw>)
- **LexisNexis** (<https://www.lexisnexis.com/en-us/products/lexis-plus.page>)
- **State of Oregon Law Library** (<https://soll.libguides.com/index>)
- **Multnomah Law Library** (<https://www.multlawlib.org/>)
- **Washington County Law Library** (<https://www.washingtoncountyor.gov/law-library>)
- **PLF** (<https://www.osbplf.org/services/resources/>)
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- **inPractice Blog** (<https://www.osbplf.org/services/resources/#blog>)
- **inBrief Newsletter** (<https://www.osbplf.org/services/resources/#inbrief>)
- **PLF Books** (https://www.osbplf.org/services/resources/#plf_books)

6. Build regular time into your calendar to attend CLEs

Oregon attorneys are required to attend a certain number of CLEs to maintain their active bar status. Don't just meet the minimum standards set forth by the Bar, though. Reframe your attendance in a way that supports and maintains the competency requirement for your practice. Regularly seek out the CLEs and other educational seminars relevant to your practice, even if you don't need the credits. Familiarize yourself with various CLE providers and keep them on your radar. Visit their websites and sign up to receive notifications about upcoming presentations. You can find a large collection of CLEs available through the PLF (<https://www.osbplf.org/services/resources/#cles>) and OSB (<https://www.osbar.org/cle/>). Even if it's not Oregon-accredited, you can submit an application to the Bar to seek accreditation for the program (<https://hello.osbar.org/MCLE/Accreditation/Member>).

7. Take advantage of external resources

Follow general news sources and those related to your area(s) of practice. Attend court hearings, especially if you are trying to gain more experience as a litigator. While it may seem awkward to show up at a court proceeding uninvited, public hearings are open for anyone to attend. It can be a great learning opportunity, especially for solo attorneys who don't have coworkers to observe in court. Consider reviewing public court records. A subscription to the Oregon eCourt Case Information system (<https://www.courts.oregon.gov/services/online/Pages/ojcin.aspx>) allows you access to all Oregon circuit courts and the Oregon Tax Court. Do your own due diligence and research to verify any news sources and after attending any hearing or reviewing public court records.

8. Use checklists and templates

Trying to reinvent the wheel with every new matter will only increase your odds of making a mistake. Instead, find reliable sources of available checklists and templates that you can customize for your practice. This will save time by not having to remember the steps involved in each case type or building a template from scratch. You can find many checklists and templates available for free on our website (<https://www.osbplf.org/services/resources/>). OSB BarBooks (<https://www.osbar.org/legalpubs/>) also maintains a large collection of templates. Always double-check the original source to verify you have the most recent version.

Thinking about malpractice can be intimidating if you feel that it's totally out of your control. Certainly, no one tactic is guaranteed to prevent a claim. As we've shown, though, you have a number of options within your power to help mitigate your risk. Knowing you're taking proactive steps to protect yourself and your clients will go a long way toward better peace of mind.

Rachel Edwards is a PLF Practice Management Attorney.

Tips, Traps, and Resources



PRACTITIONERS BEWARE OF ORCP 21 RENUMBERING

A few lawyers have been caught off guard by the renumbering of Rule 21 in the Oregon Rules of Civil Procedure (ORCP). The change was made when the Council on Court Procedures amended the ORCP on December 12, 2020. The Council renumbered ORCP 21A(1)-(9) to ORCP 21A(1)(a)-(i) and made other minor changes to ORCP 21. Although the amendments took effect January 1, 2022, some practitioners did not notice until they were alerted at the last minute.

The PLF has not heard of any issues resulting from lawyers citing or referring to the old numbering in documents filed with the court. As a caution, though, don't rely on templates or samples of briefs, motions, or other court-related documents without verifying the numbering. If you haven't done so already, update all brief and motion templates that refer or cite to ORCP 21 to reflect the new numbering schema.



ENSURE IOLTA FUNDS ARE INSURED

Recent headlines concerning the instability of certain regional banks have understandably prompted attorneys to investigate the safety of the client funds in their IOLTA accounts. Regarding FDIC and NCUA deposit insurance, the Oregon Law Foundation has clarified that “[u]nder the fiduciary account rules for deposit insurance, **as long as an account is properly designated as an IOLTA or lawyer trust account and the attorney has good records**, each client is protected up to the standard deposit insurance limits, currently \$250,000.” (Emphasis added.) As such, it is incumbent upon lawyers — not their staff — to protect client funds by properly labeling accounts and keeping good records. At a minimum, attorneys should do the following:

- Designate accounts holding funds in trust as “IOLTA” or “Lawyer Trust Account.”
- Perform monthly three-way reconciliations of the client ledgers, trust journal, and bank statement.



Tips, Traps, and Resources Continued

- Maintain complete financial records for five years, including the client ledgers, trust journals, bank statements, cancelled checks, deposit slips, billing statements, bank notices, etc.

If you have further questions about deposit insurance, please reach out to your banking partner or the Oregon Law Foundation. For guidance about trust account administration, check out the PLF's free Guide to Setting Up & Using Your Lawyer Trust Account. Or contact the practice management attorneys at the PLF – we are here to help.



LOCATING ANOTHER ATTORNEY'S CLIENT FILE

Attorneys are sometimes approached by a client who needs help tracking down a file from another attorney who is no longer practicing or has passed away. The client may have some details, but you often step into the role of a private investigator. Most solo and small firm practitioners store their own files after they stop practicing unless a

remaining firm member is willing to keep their files for them, whereas most midsize and larger firms store client files. If you know they were with another firm at the time they stopped practicing or passed away, contact that firm and see if they still have the client's file. If no results, search for the attorney's name or bar number in the OSB Member Directory. Active bar members are required to keep their contact information updated. Sometimes, the directory is still current even if they are no longer active. If it's not, you can submit a request for the file at <https://www.osbar.org/regulatory/LocatingAttorneyFiles.html>. The bar sometimes learns the location of an attorney's files when they change status. If this still produces no results, contact the PLF at 503.639.6911. We may be able to help if we were involved in assisting with the closure of the attorney's practice or received information about storage of their files. You can also find our File Retention and Destruction Guidelines on our website under Services/CLEs & Resources/Practice Aids. Contact a practice management attorney for additional tips and resources regarding file retention and destruction.